

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:13.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P. SATHASIVAM

AND

THE HON'BLE MR. JUSTICE S. TAMILVANAN

WRIT APPEAL Nos.2817 and 2818 of 2003

M.Krishnamoorthy ... Appellant in WA.No.2817/2003

K.G. Subramani ... Appellant in WA.No.2818/2003

vs.

1.Union of India rep. By the
Summary Court Martial/Commanding
Officer Commanding 4 Engineer
Regiment, C/o.56 APO
Secunderabad, Andhra Pradesh.

2.The General Officer Commanding-
In-Chief-Headquarters
Southern Command-cum-Appellate
Authority, Pune 411 001
Maharashtra.

.. Respondents in both the WAs.

सत्यमेव जयते

Writ Appeals filed under Clause 15 of the Letters Patent against the common order of His Lordship Mr. Justice D. Murugesan made in W.P.Nos.19155 & 19154 of 1999 dated 19.04.2002 . These writ petitions filed under Article 226 of the constitution of India writ of certiorarified mandamus calling for the records of the Respondents of the Respondents herein, comprised in the findings and sentence of the summary court martial, the first respondent dated 14.10.98 as against the petitioner herein, and the Appellate order made in No.2406002/480/DU-3 dated 4.8.99 passed by the 2nd respondent herein, quash the entire proceedings and orders above referred to, and consequently directing the respondents to reinstate the petitioner herein in active Army service in 4 Engineer Regiment, C/o 56 APO as Spr (L/NK) with all backwages and attendant benefits (WP No.19154 and 19155 of 1999).

For appellants : Mr. G. Thangavel

For respondents : Mr. P. Wilson
Asst. Solicitor General

..

COMMON JUDGMENT

(Judgment of the Court delivered by P. SATHASIVAM, J.)

Aggrieved by the common order of the learned single Judge dated 19.04.2002 made in W.P.Nos.19155 and 19154 of 1999, the writ petitioners, viz., M. Krishnamoorthy and K.G. Subramani, preferred the above writ appeals.

2. For convenience, we shall refer the parties, as arrayed before the learned single Judge.

3. Both the petitioners while working in the Indian Army as L/Naick, charge sheeted for a civil offence for outraging modesty of a woman, for which a case was registered against them at Bolarum (Andhra Pradesh) Police Station on 26.02.1997 on the complaint given by the victim Mrs. Subra Saha. As per the complaint, on 20.02.1997, at about 9.50 p.m. when she was walking alone on lake line, two persons tried to over power her by holding her hands and mouth and molested her. To safeguard herself, she injured one of the person. On investigation, it was found, that M. Krishnamoorthy and K.G. Subramani (petitioners), who were attempted to outrage the modesty of the said lady. After investigation, the Bolarum Police found substantial materials against those two persons, and filed a report before the XI Metropolitan Magistrate, Secunderabad. Thereafter, the respondents made a request to the Magistrate under Section 125 of the Army Act, 1950 (in short, "the Act"), to transfer the case to them, to be tried under the Act; hence, the same was transferred to the respondents, to be tried by the Court-martial under the Act. According to the respondents, the petitioners were duly informed well in advance about Summary Court-martial as contemplated under the Act. As per the Army Rules, 1954 (in short, "the Rules"), the charge sheet and the summary of evidence were also served on them. On 14.10.1988, both of the petitioners were tried by the Summary Court Martial under the Act, and before questioning, necessary warning was also given to them. Both the petitioners pleaded guilty before the Summary Court-martial and summoned mercy and leniency. Based on their statements and their earlier statements given to S. Babu Rao, Sub-Inspector of Police, Bolarum Police Station

under Section 161 Cr.P.C. and in view of the gravity of offence committed by the petitioners, both were dismissed from service and sent to civil prison.

4. It is also the case of the Department that since the petitioners committed a civil offence under Section 354 IPC and tried under Section 69 of the Act, i.e., attempt to outrage the modesty of a woman, the trial was carried out and punishment was awarded. It is also their claim that considering the gravity of offence and the punishment prescribed in the Act, the punishment awarded by the Court-martial is fair and just. Questioning the said order of punishment, the petitioners challenged the same by way of separate writ petitions. The learned Judge, by common order dated 19.04.2002, after finding that inasmuch as the petitioners pleaded guilty of the charge levelled against them and the Court-martial followed Rule 115 (2) of the Rules, after rejecting the claim of the petitioners, dismissed their writ petitions. Hence, the above writ appeals.

5. Heard Mr. G. Thangavel, learned counsel for the appellants and Mr. P. Wilson, learned Assistant Solicitor General for the respondents.

6. Mr. G. Thangavel, learned counsel for the appellants/petitioners, after taking us through the entire evidence recorded and the proceedings of the Court-martial submitted that, in view of the statement of the complainant, the charge itself is not maintainable and the respondents ought to have exonerated the petitioners. In any event, according to him, the "plea of guilt" was not voluntary, but due to circumstances, the mandatory conditions prescribed in Rule 115(2) of the Rules have not been complied with; hence, all the punishments awarded are liable to be set aside.

7. On the other hand, Mr. P. Wilson, learned Assistant Solicitor General submitted that, the conditions provided in Rule 115(2) have been fully complied with. He also submitted that, this Court, by exercising jurisdiction under Article 226 of the Constitution, cannot go into the correctness or otherwise of the order reappraising the evidence as an appellate Court.

8. We have verified the relevant materials and considered the contentions raised by both parties.

9. From the above materials placed and the contentions raised, we have to consider:

(a) Whether the charge as framed is

maintainable? and

(b) Whether the respondents satisfied all the conditions/safeguard provided under Sub-rule (2) of Rule 115 of the Rules?

10. Regarding the first issue, it is relevant to mention the details regarding charge sheet.

"1. The Accused

(1) No. 1381177A Spr (L/Nk) M.
Krishnamurthy and
(2) No. 1383366H Spr (L/Nk) K.G.
Subramani,
both of 4 Eng. Regt. Charged with:-

AA SEC.69:

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT TO OUTRAGE HER MODESTY, CONTRARY TO SECTION 354 OF THE INDIAN PENAL CODE READ WITH SEC.34 OF THE SAID CODE.

In that they together,

at Secunderabad, on 20 Fe 97, used Criminal force to Smt Subhra Saha Wife of No.7769072H Hav (CMP) UN Saha, by catching her arms and face intending thereby to outrage her modesty. "

11. The learned counsel for the petitioners/appellants by drawing our attention to the evidence of the complainant, viz., Mrs. UN Saha, submitted that, inasmuch as she did not find fault with the delinquents, the charge as framed is not maintainable and on this ground, the consequential orders passed therein are to be set aside. In support of the above contention he very much relied on the following question put to Mrs. Saha and her answer.

"Q.4: Why do you think the assailants had attacked you?

Ans.: I think they had attacked me on someone's provocation. I feel that they did not have any wrong intentions and are innocent.

12. It is true that, at one stage, the complainant mentioned that the delinquents do not have any wrong intention and they are innocent. However, if we read her entire statement, viz., answers for other questions and other witnesses, it cannot be presumed that neither there was no such incident nor the petitioners had nothing to do with the incident. Even if we accept the stand of the petitioners, what prevented them in pleading guilty of the charge when they were put on notice, and the consequences of their statements. In this regard, it is useful to refer the judgment of the Supreme Court in the case of Union of India vs. Himmat Singh Chahar reported in 1999 (4) SCC 521, wherein their Lordships while considering similar orders passed by court-martial under Indian Army Act has concluded that the High Court exercising jurisdiction under Article 226 cannot re-appraise the evidence let in in the enquiry, as if, it is an appellate authority. The following conclusion are relevant.

" 3. In view of the rival submissions at the Bar the short question that arises for consideration is what would be the extent of the jurisdiction in exercising power under Article 226 of the Constitution over the findings of the Authority in Court Martial Proceeding? The Defence personnel serving in Army, Navy or Air Force when commit any offence are dealt with by the special provisions contained in the Army Act or the Navy Act or the Air Force Act and not by the normal Procedure Code. The said Navy Act is a complete code by itself and prescribes the procedure to be followed in case it is decided that an officer should be tried by Court Martial. The Act also provides sufficient safeguard by way of further appeal to the Chief of the Staff and then ultimately to the Union Government.

4. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the Competent Authority in the Court Martial Proceeding. It is of course true

that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial Proceeding the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior Tribunal. This being the parameter for exercise of power of judicial review against the findings of a Competent Authority in a Court Martial Proceeding, and applying the same to the impugned judgment of the High Court we have no hesitation to come to the conclusion that the High Court overstepped its jurisdiction in trying to re-appreciate the evidence of Mrs. Nirmala Sharma and in coming to the conclusion that her evidence is not credible enough to give a finding of guilt of the respondent of a charge under Section 354. We have also perused the statement of Mrs. Nirmala Sharma and the conclusion becomes inescapable on the basis of the said statement of Mrs. Nirmala Sharma that the respondent has been rightly found to have committed offence under Section 354 by the

Authorities in the Court Martial Proceedings.

The above referred decision of the Supreme Court is directly on the point and of the fact that in addition to the materials available in the form of evidence, the petitioners having pleaded guilty knowing the consequences, we are unable to accept the first contention.

13. Coming to the second contention relating to "plea of guilty or not guilty", Rule 115 of the Rules speaks about General plea of "Guilty" or "Not Guilty", which read as under.

"115. General plea of "Guilty" or "Not Guilty".- (1) The accused person's plea - "Guilty" or "Not Guilty" (or if he refuses to plead, or does not plead intelligibly either one or the other, a plea of "Not Guilty") - shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.

[(2-A) Where an accused pleads Guilty, such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the Court in the following manner:-

"Before recording the plea of Guilty of the accused, the Court explained to the accused the meaning of the charge(s) to which he had pleaded Guilty and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded Guilty. The

Court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of Guilty, accepts and records the same. The provisions of rule 115 (2) are thus complied with.]

3. "

Sub-rule(2) of Rule 115 makes it clear that, if an accused person pleads guilty, his statement shall be recorded and before recording the same, duty is cast on the Court to ascertain that he understands the nature of charge to which he pleaded guilty. It is also the duty of the Court to inform him the general effect of his statement as well as explain the difference in procedure. Further, it mandates that from the summary of evidence, if there is no material against him, the accused must be advised to withdraw the plea of guilt.

14. Now, let us consider, whether the conditions provided in Sub-rule (2) and (2-A) of Rule 115 have been fully adhered in the case on hand. Mr. P. Wilson, learned Assistant Solicitor General has placed the original proceedings of the Court-martial. It shows that when both the petitioners pleaded guilty, they were explained the meaning of the charge levelled against them, effect of pleading guilty, difference in procedure and the effect of accepting the plea of guilt. In this regard it is relevant to mention the recorded statement of the Court with regard to the plea of guilt.

"Before recording the plea of guilty offered by the accused, the court explains to the accused the meaning of the charge (s) to which he had pleaded guilty and ascertains that the accused understands the nature of the charge(s) to which he has pleaded guilty. The court has also informs the accused the general effect of the plea and the difference in the procedure which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty accepts and records the same. The

provisions of the Army Rule 115 (2) are complied with.

xxxx
(Signature)
The accused

.....
Dated:14 Oct.98

xxxx
(Gulshah Sahdev)
Col

.....
Dated;14 Oct.98"

The above statement pertains to one of the petitioners, viz., M.Krishnamurthy. Similar endorsement and recording of statement is available in the case of other petitioner, viz., K.G. Subramani. From the records produced and noting therein, we are satisfied that the conditions prescribed in Rule 115 have been fully complied with. In the separate counter affidavit it is specifically asserted that ample time was given to both the individual to study, understand and then sign any document put forth to them. The materials placed clearly show that there was no violation of Rules, agreed while recording the punishment. We are also satisfied that both the petitioners were explained the meaning of charge to which they had pleaded guilty and the Court-martial ascertained that they understood the nature of the charge, accepted and recorded the same in accordance with Rule 115(2) and (2-A); accordingly, we reject the second contention also.

15. Finally, the learned Assistant Solicitor General has brought to our notice that Section 71 of the Act enables the Court-martial to inflict punishment in respect of offences committed by persons subject to the provisions of the Act and convicted by court-martial, according to the scale. Section 73 of the Act enables the court-martial to impose one or more punishments. The said provision makes it clear that, a sentence of a court-martial may award in addition to, or without any one other punishment, the punishment specified in clause (d) of clause (e) of Section 71 and any one or more of the punishments specified in clause (f) to (1) of that section. Section 77 of the Act makes it clear that a warrant officer or a non-commissioned officer sentenced by a court-martial to transportation, imprisonment to the field punishment or dismissal from service, shall be deemed to be reduced to the ranks. The above provisions of the Army Act make it clear that court-martial is empowered to award more punishments in addition to one, such as dismissal, reduction in rank and imprisonment.

16. In view of the above provisions and in the light of the conclusion that Army Rules have been fully complied with; the petitioners are army personnel and the proved charge relates to outraging the modesty of a woman, as well as taking

note of the gravity of the offence, we are of the view that the punishment awarded by the respondents cannot be said to be either excessive or unreasonable.

We are satisfied that the learned single Judge has considered all the above mentioned aspects, including the relevant provisions of the Army Act and Army Rules as well as the procedure followed in the case of pleading guilty; we are in agreement with the said conclusion; and we do not find any error or infirmity or valid ground for interference. Consequently, both the appeals fail and are accordingly dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To

- 1.The Summary Court Martial/Commanding Officer Commanding 4 Engineer Union of India, Regiment, C/o.56 APO Secunderabad, Andhra Pradesh.
- 2.The General Officer Commanding-In-Chief-Headquarters Southern Command-cum-Appellate Authority, Pune 411 001 Maharashtra.

+ Two C.C.to the MR.G.Thangavel, Advocate S.R.No.25033

+ One C.C. to the MR.P. Wilson, Asst. Solicitor General of India S.R.No.24590

NR(25.4.2007)

P.D. Common Judgment in

W.A.Nos.2817 & 2818/2003

Dated:13.04.2007